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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-210

JOHN NICHOLS, *Petitioner*,

vs.

THE UNITED STATES OF AMERICA; Archivist of the United States, JAMES B. RHOADS; THE GENERAL SERVICES ADMINISTRATION, and Secretary of the Navy, JOHN H. CHAFEE, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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INDEX

Opinions Below 1

Jurisdiction 2

Questions Presented 2-3

Statutes, Federal Rules, and Regulations Involved 4

Statement of the Case 4-9

Reasons for Granting the Writ:

I. Public Law 89-318, considered in the light of 5 U.S.C. § 552(b)(3) does not preclude a thorough judicial determination of the Petitioner's rights to study, examine, and inspect certain evidentiary items of historical and scientific interest acquired by the Archivist of the United States for preservation; particularly when said study will not alter or affect said items in any way whatsoever 9-10

II. An administrative agency, under the aegis of Public Law 89-318 considered in the light of 5 U.S.C. § 552(b)(3), should not be permitted to make a final determination affecting the right of a serious scholar to perform a valid research function, when said scholar does not request custody of items entrusted to the administrative agency for preservation 10-12

III. The District Court for the District of Kansas erred in deciding, in defiance of Public Law 89-318 § 5, that the items requested by the Petitioner were not "records" within contemplation of the Freedom of Information Act, 5 U.S.C. §§ 551-552; further the United States Court of Appeals for the Tenth Circuit erred

when it said "We do not find it necessary to reach that question." 12-14

IV. The estate of the late President John F. Kennedy and the Archivist of the United States, pursuant to provisions of 44 U.S.C. §§ 2107-2108(c), and by terms of an agreement between said estate and the General Services Administration cannot preclude the Petitioner, or any serious and qualified scholar, from studying, examining, and inspecting said items deposited with the agency for safe-keeping 15-16

V. The United States Court of Appeals for the Tenth Circuit erred in upholding the decision of the United States District Court for the District of Kansas, by ruling that the Depositor of such items under authority of 44 U.S.C. §§ 2107, 2108(c), need not be the "owner" of said items, thereby permitting a non-owner, without property rights therein, to impose restrictions against citizens who likewise are non-owners but who have an equity in said items restricted, notably referring to provisions of 5 U.S.C. §§ 551-552, and which statutes also specifically provide that any person may have access to sought after items 17-19

VI. The rulings of the United States District Court for the District of Kansas and the United States Court of Appeals for the Tenth Circuit, are in error insofar as they state that there are no material facts in dispute and that as a consequence the Petitioner's case is ripe for disposition by summary judgment pursuant to authority of Fed. R. Civ. Proc. Rule 56, governing procedure in District Courts of the United States 19-21

VII. The Court of Appeals for the Tenth Circuit erred in affirming the ruling of the District Court for the District of Kansas which Court refused to entertain Petitioner's motion to re-open said case for the purpose of challenging affidavits filed by Vice Admiral George M. Davis, Chief of the United States Navy Bureau of Medicine and Surgery 22-25

VIII. Other Reasons for Granting the Writ 25-27

Conclusion 27

Appendix A—Statutes, Rules, and Regulations A1-A13

Appendix B—Decision of the District Court A14-A28

Appendix C—Decision of the Appeal Court A29-A36

Appendix D—Admiral Burkley's letter of September 1, 1966 to the Petitioner A37

Appendix E—Decision of the Honorable Judge Charles Halleck directing the Archivist to take some of the sought items to New Orleans for testimony in *Louisiana* v. *Shaw* A38-A41

Table of Authorities

CASES

Consumers Union v. *Veterans Administration*, 301 F. Supp. 796 18

Davis v. *Braswell Motor Freight Lines, Inc.*, 363 F. 2d 600 19

F.C.C. v. *Schreiber*, 381 U.S. 279 10

Louisiana v. *Shaw*, (1969) (198-059-C) 26

Machinery Center v. *Anchor National Life Insurance Co.*, 434 F. 2d 1 21

New York Times v. *Sullivan*, 376 U.S. 254 12

U. S. v. *Gossett*, 416 F. 2d 565, *cert. denied* 397 U.S. 961 21

U. S. ex rel. Louisiana v. *Rhoads*, (825-69A) 26
Washington Post Co. v. *Keogh*, 365 F. 2d 965, *cert. denied* 385 U.S. 1011 21

STATUTES

5 U.S.C. § 551 (80 Stat. 381) 2, 3, 4, 12, 17
5 U.S.C. § 552 (80 Stat. 383) 2, 3, 4, 5, 7, 8, 9, 10, 12, 17
28 U.S.C. § 2101 2
44 U.S.C. § 2107 (82 Stat. 1288) 2, 3, 4, 7, 15, 17
44 U.S.C. § 2108 (82 Stat. 1289) 2, 3, 4, 7, 15, 17
44 U.S.C. § 3301 (82 Stat. 1299) 13
Public Law 89-318 (79 Stat. 1185) 2, 4, 6, 7, 9, 10, 12, 13, 14, 15
32 C.F.R. § 701 ..... 4, 5
41 C.F.R. § 105-60.104 ..... 4, 13
41 C.F.R. § 105-60.404 4
Fed. R. Civ. Proc., Rule 56 ..... 3, 4, 21, 25
Fed. R. Civ. Proc., Rule 60 ..... 4, 8, 24

MISCELLANEOUS

Report of the President's Commission on the Assassination of President John F. Kennedy. [Warren Commission Report] United States Government Printing Office, 1964 (pp. 541 and 544) 23-24

Senate Report 813 entitled "Clarifying and Protecting the Right of the Public to Information, and for Other Purposes" introduced into the 89th Congress (*1st Session*), 1965, by the Honorable Edwin V. Long, Senator from Missouri 25

House Report 813 entitled "Preserving Evidence Pertaining to the Assassination of President Kennedy" introduced into the 89th Congress (*1st Session*), 1965, by the Honorable Byron Rodgers, Representative from Colorado 26

Unpublished prosecutor's secret review of X-ray films and photographs taken at autopsy of the late President Kennedy as requested by the Justice Department. Pages 122-127 of the "record", presumably obtainable from the Justice Department 23

Unpublished Expert Panel Review of the X-ray films and photographs taken at autopsy of the late President Kennedy as requested by Attorney General Ramsey Clark. Pages 129-143 of the "record", presumably also obtainable from the Justice Department 23

Admiral Burkley's letter of September 1, 1966 to the Petitioner advising that sought items, from the autopsy, were being held in a permanent receptacle under the same conditions as the President's private papers 24

Order of the Honorable Judge Charles Halleck directing the Archivist to take some of the sought items to New Orleans and testify in the case of *Louisiana* v. *Shaw* (198-059-C) 26

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THE UNITED STATES OF AMERICA; Archivist of the United States, JAMES B. RHOADS; THE GENERAL SERVICES ADMINISTRATION, and Secretary of the Navy, JOHN H. CHAFEE, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above case on May 12, 1972.

CITATIONS TO OPINIONS BELOW

The opinion of the District Court for the District of Kansas, printed in Appendix B hereto, *infra,* pp. A14-A28, is reported at 325 F. Supp. 130 (1971).

The opinion of the Court of Appeals for the Tenth Circuit, printed in Appendix C hereto, *infra,* pp. A29-A36, is reported at ..... F. 2d ..... (1972).

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was made and entered on May 12, 1972, and a copy thereof is appended to this petition in Appendix C, *infra*, on pages A29-A36. The jurisdiction of this Court is invoked under 28 U.S.C. § 2101 (c).

QUESTIONS PRESENTED

(1) Whether Public Law 89-318, considered in the light of 5 U.S.C. § 552(b)(3), precludes a thorough judicial determination of the Petitioner's rights to study, examine, and inspect certain evidentiary items of historical and scientific interest acquired by the Archivist of the United States for preservation; particularly when said study will not alter or affect said items in any way whatsoever.

(2) Whether an administrative agency, under aegis of Public Law 89-318 considered in the light of 5 U.S.C. § 552(b)(3), should be permitted to make a *final determination* affecting the right of a serious scholar to perform a valid research function, when said scholar does not request custody of items or articles entrusted to the administrative agency for preservation.

(3) The District Court for the District of Kansas erred in deciding, in defiance of Public Law 89-318 § 5, that the items requested by the Petitioner were not "records" within contemplation of the Freedom of Information Act, 5 U.S.C. §§ 551-552; further the United States Court of Appeals erred when it decided: "We do not find it necessary to reach that question."

(4) Whether the estate of the late President John F. Kennedy and the Archivist of the United States, pursuant to provisions of 44 U.S.C. §§ 2107, 2108(c), and by terms of an agreement between said estate and the Gen-

eral Services Administration, can preclude the Petitioner, or any serious and qualified scholar, from studying, examining, and inspecting said items deposited with the agency for safe-keeping and preservation.

(5) The United States Court of Appeals for the Tenth Circuit erred in upholding the decision of the United States District Court for the District of Kansas, by ruling that the depositor of such materials, under authority of 44 U.S.C. §§ 2107, 2108(c), need not be the "owner" of said materials, thereby permitting a non-owner, without property rights therein, to impose restrictions against citizens who likewise are non-owners but who have an obvious equity in said items restricted, notably referring to provisions of 5 U.S.C. §§ 551-552 and which statutes also specifically provide that *any person* may have access to sought after items.

(6) The rulings of the United States District Court for the District of Kansas and the United States Court of Appeals for the Tenth Circuit, are in error in so far as they state that there are no material facts in dispute, consequently that the Petitioner's case is ripe for disposition by summary judgment pursuant to authority of Fed. R. Civ. Proc., Rule 56, governing procedure in District Courts of the United States.

(7) Whether the Court of Appeals for the Tenth Circuit erred in affirming the ruling of the District Court for the District of Kansas, which ruling refused to entertain Petitioner's Motion to Reopen said case for the purpose of challenging affidavits filed by Vice Admiral George M. Davis, Chief of the United States Navy Bureau of Medicine and Surgery.

STATUTES, FEDERAL RULES, AND REGULATIONS INVOLVED

The statutory provisions involved are: 5 U.S.C. § 551; 5 U.S.C. § 552; 44 U.S.C. § 2107; 44 U.S.C. §2108; 44 U.S.C. § 3301; Public Law 89-318; 32 C.F.R. § 701.1; 41 C.F.R. § 106-60.104; 41 C.F.R. § 105-60.404; Fed. R. Civ. Proc. 56; and Fed. R. Civ. Proc. 60. The relevant portions thereof are printed in Appendix A, *infra*, pp. A1-A13.

STATEMENT OF THE CASE

The Petitioner, John Nichols, a physician residing in Prairie Village, Johnson County, Kansas, originally brought this action in the United States District Court for the District of Kansas by filing a complaint against the United States of America; Archivist of the United States, James B. Rhoads; The General Services Administration, and Secretary of the Navy, John H. Chafee. The complaint asserted a claim under the Freedom of Information Act, 5 U.S.C. §§ 551-552.

It was the Petitioner's claim that the Archivist of the United States and the Department of the Navy had wrongfully refused to make available to the Petitioner "records" to which the Petitioner was entitled under terms of said legislation.

The complaint alleged that certain items, as artifacts arising from the assassination of the late President John F. Kennedy, are being illegally withheld by the Respondents; the Petitioner having submitted requests to inspect, study, and examine same. Following denial of said requests, the Petitioner, pursuant to those provisions of 41 C.F.R. § 105-60.404 pertaining to appeals within United States Government Agencies, did submit proper appeals to the Director of Information. As to items properly within

custody of the United States Department of the Navy the Petitioner also submitted requests for permission to examine same and after denial of permission the Petitioner also submitted proper appeals pursuant to those provisions of 32 C.F.R. § 701.1(k) which refer to appeals of naval matters within the purview of 5 U.S.C. § 552. Following denial of these appeals, and having exhausted all administrative remedies, the Petitioner then sought relief in the District Court of the United States for the District of Kansas.

Briefly stated, the Petitioner desires to inspect, study, and examine certain items, including bullets and bullet fragments, X-ray films and photographs taken of the deceased President, items of clothing worn by the late President at the moment of assassination, histological preparations of skin from the margin of the bullet holes of the neck of the deceased President, and one 13 x 20 mm. object newly found by Attorney General Ramsey Clark's Expert Review Panel in photographs of the brain of the late President, and which object said expert panel could not identify.

In no event has the Petitioner requested custody of said items, nonetheless he does desire to inspect, study and examine same; and additionally he seeks to submit some of the items to harmless neutron activation analysis. The results of this examination would either confirm or refute certain conclusions reached by the President's Commission on the Assassination of President Kennedy, popularly known as the Warren Commission.

A majority of those items requested by the Petitioner for examination, inspection, and study were considered by the District Court not to be "records" within the meaning of the Freedom of Information Act. The Court further

decided that the term "records" had not been adequately defined within the text of the applicable legislation. (Appendix B, *infra*, pp. A20-A21) This result was achieved in defiance of the clear mandate of Congress expressed in Public Law 89-318, Sec. 5 (Appendix A, *infra*, p. A7) which explicitly, specifically, and expressly declares all said items, pertaining to the assassination and acquired by the Attorney General, to be "records" *for purposes of law and otherwise.*

Further, the District Court ruled that restrictions contained in a Letter of Agreement proposed by the executor of the Kennedy Estate and accepted by the General Services Administration, foreclosed the right of the Petitioner to examine items specifically referred to in said Letter of Agreement. Among these items were X-ray films and gross photographs taken at the time of autopsy together with articles of clothing, all being evidence arising from and pertaining to the assassination.

Ruling on a motion of the Respondents for summary judgment, the District Court found that no material issue of fact exists and sustained the motion aforesaid. Additionally the District Court, in its written opinion (Appendix B, *infra*, p. A27), found that:

> "Until Congress sees fit to wipe out these exemptions, so far as it is constitutionally able to do so, a person in Plaintiff's position, though he be possessed with superb qualifications, has the purest intentions and be so ever objective in his research and entitled to pursue it, will be *thwarted by the influence and pressures exerted by bureaucrats* which will likely hamper his investigations, no matter how noble and patriotic his purpose." [emphasis added]

Affirming, the United States Court of Appeals for the Tenth Circuit also ruled that the Petitioner had presented

no disputed material facts. (Appendix C, *infra*, p. A36) The Court of Appeals also found that all items requested from the Archivist of the United States fall within the third of nine exemptions to the general rule of disclosure, 5 U.S.C. § 552(b)(3), which subsection, according to the Appellate Court ". . . does not apply to matters that are specifically exempt from disclosure by statute. . .". (Appendix C, *infra*, p. A32) The Appellate Court did not explain or amplify how, or why, the sought items or materials must necessarily be classified under said exemption provision, nor did they mention the statute governing the classification.

However, the Appellate Court did note that all items sought from the Archivist by the Petitioner came into custody of the United States pursuant to two statutes, namely, Public Law 89-318, and 44 U.S.C. §§ 2107, 2108(c). Public Law 89-318 § 5, specifically provides, in sum, that all items acquired by the United States pursuant to said Act shall be regarded as "records" and placed under the jurisdiction of the Administrator of General Services for preservation under such rules and regulations as he may prescribe. The Archivist has prescribed rules and regulations concerning the viewing, study, and use of those Warren Commission exhibits acquired by the agency; and by dint of such rules and regulations the Archivist refused to grant the Petitioner permission to perform his research efforts. The Appellate Court concluded that all items acquired by the United States pursuant to the provisions of Public Law 89-318 fall within the exemption of 5 U.S.C. § 552(b)(3).

With regard to requested items in the custody of the Archivist pursuant to 44 U.S.C. §§ 2107, 2108(c) the Court of Appeals ruled that the agreement between the Kennedy Estate and the General Services Administration precluded access by the Petitioner to items restricted by the

terms of the agreement. (Appendix C, *infra*, p. A35) The court additionally affirmed the ruling of the trial court which held that "ownership" of such items was irrelevant, and further added that inasmuch as the Petitioner was not a party to the agreement, and absent a claim of ownership, he had no standing to object to the letter of agreement or its terms. This position was reached despite the fact that the Petitioner, as a citizen and a scholar, does have an obvious equity in said items and 5 U.S.C. § 552 states that *any person* may file and maintain a suit and further the District Court shall determine the matter *de novo* with the burden of sustaining its action on the denying agency. It was this line of response, whim and caprice of random bureaucrats and judges, that the Freedom of Information Act was intended to eliminate. Senate Report 813, 89th Congress, 1965, on the bill observed that among the all too frequent reasons for refusal was included ". . . the person making the request was not 'properly and directly' concerned".

Concerning items requested from the United States Navy, the Court of Appeals noted that affidavits of Vice Admiral George M. Davis, alleging that the items sought by the Petitioner had vanished from naval custody, had remained unchallenged. The court also observed that a Motion by the Petitioner to Reopen the Case for the purpose of further challenging Admiral Davis' affidavits, made pursuant to Rule 60, Fed. R. Civ. Proc., was addressed to the discretion of the trial court, and as a result did not disturb the trial court's determination, for lack of showing an abuse of discretion. (Appendix C, *infra*, p. A36) Neither the trial court nor the Appellate Court concerned itself with how said items disappeared from custody of the Navy, if, indeed, they did so disappear, as alleged by Admiral Davis. Demonstration of the untruth-

fulness of Admiral Davis' allegations was part of the Petitioner's purpose in his motion to further challenge, by interrogatories, said affidavits, as well as to locate the current whereabouts of the sought items, if, indeed, they have actually vanished from naval custody.

The trial court, ignoring the specific definition of "records" prescribed by Congress in Public Law 89-318, § 5, ruled that most of the items sought to be examined by the Petitioner were not included within the meaning of the word "records" as it interpreted 5 U.S.C. § 552. Bypassing this issue the Court of Appeals wrote: *"We do not find it necessary to reach that question."* [emphasis added] (Appendix C, *infra*, p. A32)

REASONS FOR GRANTING THE WRIT

I

PUBLIC LAW 89-318, CONSIDERED IN THE LIGHT OF 5 U.S.C. § 552(B) (3), DOES NOT PRECLUDE A THOROUGH JUDICIAL DETERMINATION OF THE PETITIONER'S RIGHTS TO STUDY, EXAMINE, AND INSPECT CERTAIN EVIDENTIARY ITEMS OF HISTORICAL AND SCIENTIFIC INTEREST ACQUIRED BY THE ARCHIVIST OF THE UNITED STATES FOR PRESERVATION; PARTICULARLY WHEN SAID STUDY WILL NOT ALTER OR AFFECT SAID ITEMS IN ANY WAY WHATSOEVER.

The Court of Appeals has rightly stated that the national interest requires the United States to acquire items of evidence considered by the Warren Commission and that those items be preserved. Pursuant to the authority granted by Public Law 89-318 the Archivist has prescribed rules and regulations concerning the viewing, study, and use of said exhibits. Accordingly the Court of Appeals found that these rules and regulations are within

the Congressional grant of authority of Public Law 89-318 and are reasonably designed to accomplish the purpose intended. Without further consideration of the objectives, purposes, and intentions of the Freedom of Information Act, the Court peremptorily concluded that all items acquired by the United States pursuant to the law, fall within the exception of 5 U.S.C. § 552(b)(3). (Appendix C, *infra*, p. A33) The court did not state the reasons why the said items must be so classified, nor did it cite the statute, if any, governing proper classification.

Despite the fact that disclosure of administrative agency action and proceedings is generally favored, *F. C. C. v. Schreiber*, 381 U.S. 279, the opinion of the Court of Appeals in this instance did not attempt explanation or rationalization of the reasonableness of the decisions made at the administrative level, nor did the Court consider the crucial fact that the Petitioner at no time requested custody of the items he sought to study, inspect, or examine. The Petitioner has not been afforded the opportunity to demonstrate his motivation or his purpose for making such requests; nor has the reasonableness or unreasonableness of the Petitioner's requests been assessed at the judicial level.

II

AN ADMINISTRATIVE AGENCY, UNDER THE AEGIS OF PUBLIC LAW 89-318, CONSIDERED IN THE LIGHT OF 5 U.S.C. § 552 (B) (3), SHOULD NOT BE PERMITTED TO MAKE A FINAL DETERMINATION AFFECTING THE RIGHT OF A SERIOUS SCHOLAR TO PERFORM A VALID RESEARCH FUNCTION, WHEN SAID SCHOLAR DOES NOT REQUEST CUSTODY OF ITEMS ENTRUSTED TO THE ADMINISTRATIVE AGENCY FOR PRESERVATION.

Neither the Court of Appeals nor the District Court made efforts to determine whether the Petitioner's projected research ambitions are or could be relevant to the public benefit. Nor was any judicial effort made to balance the validity of the Petitioner's theories and purposes against any possible harm to an established and orderly process of record keeping. Pertinent administrative rules and regulations were afforded *carte blanche* approval without hint of consideration by the court as to their adequacy except for an unexplained conclusion that they were reasonable. As a verity the trial court did express the following opinion:

> "Until Congress sees fit to wipe out these exemptions, so far as it is constitutionally able to do so, a person in plaintiff's position, though he be possessed with superb qualifications, has the purest intentions and be so ever objective in his research and entitled to pursue it, will be *thwarted by the influence and pressures exerted by bureaucrats,* which will likely hamper his investigations, no matter how noble and patriotic his purpose." [emphasis added] (Appendix B, *infra,* p. A27)

Nonetheless, it is submitted that a question of this magnitude and importance requires a more exacting and studied determination by a judicial body. If Congress has, in the Freedom of Information Act, enacted a vague and imperfect legislative product it is necessary that any judicial body, possessing jurisdiction over the subject matter, assess and interpret the adequateness, the validity, and the legitimacy of Congressional action. In sum it is submitted that the powers of an administrative agency, in this instance, have been enhanced at the expense of vital first amendment freedoms—the right to know, the right to ascertain the truth, and, indeed, the right to publish.

Peremptory judicial inspection and scrutinizing of administrative procedures void of meaningful explanation for future use as a precedent, cannot help but cause, if not precipitate a *drying-up of valid constructive research* efforts, or put in more general terms, can only frustrate the right to know and to be informed. *New York Times* v. *Sullivan*, 376 U.S. 254.

III

THE DISTRICT COURT FOR THE DISTRICT OF KANSAS ERRED IN DECIDING, IN DEFIANCE OF PUBLIC LAW 89-318 § 5, THAT THE ITEMS REQUESTED BY THE PETITIONER WERE NOT "RECORDS" WITHIN CONTEMPLATION OF THE FREEDOM OF INFORMATION ACT, 5 U.S.C. §§ 551-552; FURTHER THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT ERRED WHEN IT SAID "WE DO NOT FIND IT NECESSARY TO REACH THAT QUESTION".

The trial court stated that a "record" is intended to serve as evidence of something written, said, or done and is not kept to gratify the curious or the suspicious. (Appendix B, *infra*, p. A21) Employing an out-of-date dictionary definition of the term, *now expunged* from the current third edition of Webster's International Dictionary *Unabridged*, the trial court referred to a "record" as that which is written or transcribed to perpetuate knowledge. Finding no satisfactory definition of the term "records" within the text of the Freedom of Information Act itself, the court, in effect, accepted an *obsolete* dictionary definition of the word, concluding that the items sought by the Petitioner were not "records". (Appendix B, *infra*, p. A20)

The trial court ignored the clear mandate of Congress and the electorate in respect to the classification of

items acquired pursuant to Public Law 89-318 § 5, and which statute reads:

> Sec. 5. "All items acquired by the United States pursuant to section 2 of this Act *shall be deemed personal property and RECORDS* of the United States for the *purposes of laws relating to the custody, administration, and protection of personal property and records* of the United States, including, but not limited to, sections 2071 and 2112 of title 18 of the United States Code." [emphasis added] (Appendix A, p. A7)

Regrettably, selection of this narrow, now *abandoned*, definition of the term, perforce, excludes many *"records"* of extinct civilizations; e.g., the pre-historic astronomical observatory at Stonehenge, and the archeological findings [*records*] yielding information vital to understanding of several Mesopotamian cultures, to cite only two examples. It would further appear that the trial court has overstressed a literal definition of the term while failing to give consideration to the relative merits of a complex factual situation and the explicit instructions of Public Law 89-318 § 5. Likewise, it is apparent that the court, by emphasizing the phrase "other documentary materials" within the context of 44 U.S.C. § 3301 has accentuated the significance of "documents" as distinguished from analyzing the significance of record keeping in general. Hence, the Petitioner maintains that the classification, sorting, or recording of documentary materials, in a proper legal sense, is but one facet of the task of record keeping.

Further within the context of 44 U.S.C. § 3301 it is *unambiguously stated* that the word "records" includes many items for preservation, *"regardless of physical form or characteristics"*. [emphasis added] Similarly, the General Services Administration, in adopting its definition of "records" has, in 41 C.F.R. § 105-60.104(a), again

employed the identical terminology, namely, *"regardless of physical form or characteristics"*. [emphasis added]

Plain to see is the fact that the items requested by the Petitioner have been deliberately acquired as "records" by the mandate of Congress and have been preserved, and hopefully will be preserved, as "records" for future enduring use. If need be these items may well constitute valid "records" in court, in public or in private investigative proceedings or simply for purposes of recording a signal historic event.

In effect, the trial court by unduly restricting the definition of the term "records", as such within the limits of the Freedom of Information Act, and the Court of Appeals by finding it "unnecessary to reach the question" (Appendix C, *infra,* p. A32), have abdicated a significant judicial function,—namely, interpreting and analyzing an ambiguous legislative enactment so as to effect legislative intent within limits set by the Constitution. However, and more importantly, the District Court ignored the specific, explicit, and exact definition and classification as "records" assigned to the items by the studied and deliberate Act, Public Law 89-318 § 5, when Congress directed acquisition of said "records". The Appellate Court has also abdicated another of its functions by deliberately ignoring this omission of the District Court to consider the clearly stated intent of Congress.

IV

THE ESTATE OF THE LATE PRESIDENT JOHN F. KENNEDY AND THE ARCHIVIST OF THE UNITED STATES, PURSUANT TO PROVISIONS OF 44 U.S.C. §§ 2107-2108(c), AND BY TERMS OF AN AGREEMENT BETWEEN SAID ESTATE AND THE GENERAL SERVICES ADMINISTRATION CANNOT PRECLUDE THE PETITIONER, OR ANY SERIOUS AND QUALIFIED SCHOLAR, FROM STUDYING, EXAMINING, AND INSPECTING SAID ITEMS DEPOSITED WITH THE AGENCY FOR SAFE-KEEPING.

Both the trial court (Appendix B, *infra*, p. A25) and the Court of Appeals (Appendix C, *infra*, p. A35) have concluded that X-ray films, photographs, and items of personal clothing sought by the Petitioner may be withheld from examination by restrictions contained in a Letter of Agreement of 1966 made pursuant to 44 U.S.C. §§ 2107 and 2108(c). The Petitioner agrees that it was fitting and proper for Congress to ordain that papers, documents, and items of historical significance may be deposited with the Administrator of General Services, and that he, in turn, may accept same subject to restrictions stipulated by the donor when said donor possesses appropriate authority to so restrict.

Nonetheless, it is submitted that the items requested for study in this instance are not, and never can be, classified as "papers, documents, or other historical materials", as contemplated by the explicit terms of 44 U.S.C. §§ 2107 and 2108(c). In fact, such classification is specifically precluded by the explicit terms of Public Law 89-318 § 5. The X-ray films and photographic films were, without question, purchased, exposed, developed, and printed at public expense in an admittedly public facility, namely, a

United States Navy Hospital. These items were so exposed, developed, interpreted, and recorded for the purpose of helping to resolve a matter of public concern, namely, a homicide. Doubtless, the assassination of a President affects the national conscience to a much greater degree than does the murder of a nameless private citizen, however, matters such as conscience, presidential dignity, and national remorse do not determine property rights or the status of evidence so collected. One may additionally contend, and with validity, that items of personal clothing, even though worn by a President of the United States, can not be classified as "papers, documents, or other historical materials", as those items are defined in the limiting statutes. Had Mr. Lee Harvey Oswald survived, or assuming that another assassin may yet be found and prosecuted, it would obviously not be within the province of any individual or his representatives to restrict access to materials of vital evidentiary importance.

Unquestionably the estate of President Franklin Delano Roosevelt possessed the authority to donate library and museum materials and other records. The family of President Theodore Roosevelt also had full authority to donate his residence together with many of his personal possessions. Throughout the term of office of any President of the United States many items of historical interest and importance are collected and it is equally important that these be preserved.

The Petitioner does not question the need for preserving any and all items relevant to the assassination of President Kennedy; but the fact of collection and preservation are not the sole matters at issue. Among the questions at issue are those relating to the right of any private individual (i.e., a non-owner) to place restrictions upon the uses of items, evidence, or artifacts which are obviously already within the public domain.

V

THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT ERRED IN UPHOLDING THE DECISION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS, BY RULING THAT THE DEPOSITOR OF SUCH ITEMS UNDER AUTHORITY OF 44 U.S.C. §§ 2107, 2108(c), NEED NOT BE THE "OWNER" OF SAID ITEMS, THEREBY PERMITTING A NON-OWNER, WITHOUT PROPERTY RIGHTS THEREIN, TO IMPOSE RESTRICTIONS AGAINST CITIZENS WHO LIKEWISE ARE NON-OWNERS BUT WHO HAVE AN EQUITY IN SAID ITEMS RESTRICTED, NOTABLY REFERRING TO PROVISIONS OF 5 U.S.C. §§ 551-552, AND WHICH STATUTES ALSO SPECIFICALLY PROVIDE THAT ANY PERSON MAY HAVE ACCESS TO SOUGHT AFTER ITEMS.

The trial court (Appendix B, *infra*, pp. A23-A24) and the Court of Appeals (Appendix C, *infra*, p. A35) both determined that it was not necessary for the depositor of items or materials with the Archivist of the United States to be the "owner". The Petitioner agrees with the determinations, so made, and admits that the controlling statutes do not require that a depositor be the "owner" within a sense of possessing absolute title or right to possession of items so donated or deposited.

It is further agreed that the parties to the Letter of Agreement were the Administrator of General Services of the United States and a representative of the Kennedy Estate. Likewise admitted is the obvious fact that both parties recognized some proprietary interest of the Kennedy Estate in the items placed on deposit pursuant to the terms of the agreement. To hold otherwise would denigrate the import of legislation which most clearly provides that

presidential papers and other historical items shall be preserved.

The Court of Appeals has determined that the Petitioner was not a party to the agreement, and has concluded that, absent a claim of ownership, he has no standing to object to the Letter of Agreement or its terms. (Appendix C, *infra*, p. A35) Admittedly, the Petitioner is not and never has claimed ownership, nor has he claimed right to possession or possessory interest in the items so deposited, nor has the Petitioner claimed that he was in any manner a party to the Letter of Agreement. However, it is submitted that these factors—namely the Petitioner's possessory interest or interests, or lack thereof; being, or not being, a party to the agreement—are basically irrelevant.

Essentially, the Petitioner challenges the right of any donor to impress restrictions which may frustrate or impair a superior public interest. In this instance that public interest may well include the investigation of, or even the possible solution of a crime or a series of crimes. Balancing the recognized right to restrict against a public interest or matter of grave national concern, seems not to be out of order. Neither the trial court nor the Appellate Court have touched upon this crucial element of the case. At most, following the assertion that the Petitioner had no title, interest, or standing to raise objection, the Court of Appeals summarily, without more, concluded that the Letter of Agreement was binding and that its restrictions are reasonable. The multi-faceted aspect of the words "reasonable" or "reasonableness" were neither discussed nor amplified.

Judge Croake in *Consumers Union* v. *Veterans Administration*, 301 F. Supp. 796, at 799, most pointedly alluded to the fact that the Freedom of Information Act

made disclosure the general rule, while noting that the Act permitted withholding only certain information specifically exempted. Further, he observed that the Act requires the agency to carry the burden of sustaining its decision to withhold information. In *Davis* v. *Braswell Motor Freight Lines, Inc.*, 363 F.2d 600, the Court unequivocally held, even though an agency refuses to permit disclosure, that *ultimate determination of privilege remains with the courts.* [emphasis added] Except for the fact that the Court of Appeals has peremptorily determined that agency action was reasonable, it can scarcely be assumed that this decision, uttered *in vacuo* and divorced from consideration of the ultimate facts in dispute, can satisfy even minimal requirements respecting burden of proof.

VI

THE RULINGS OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS AND THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, ARE IN ERROR INSOFAR AS THEY STATE THAT THERE ARE NO MATERIAL FACTS IN DISPUTE AND THAT AS A CONSEQUENCE THE PETITIONER'S CASE IS RIPE FOR DISPOSITION BY SUMMARY JUDGMENT PURSUANT TO AUTHORITY OF FED. R. CIV. PROC., RULE 56, GOVERNING PROCEDURE IN DISTRICT COURTS OF THE UNITED STATES.

It is difficult to discern how either the trial court or the Court of Appeals could have arrived at the decision that there are no material facts in dispute, recalling that the Petitioner has not been afforded to factually present his reasons for, or the scope of, or possible results of his research efforts. The Petitioner maintains, and justifiably so, that he must *factually* demonstrate his intent, his

motivation, as well as his overall purpose for making this request. Granted, the trial court did state that the Petitioner's efforts ". . . *will be thwarted by the influence and pressures exerted by bureaucrats which will likely hamper his investigations, no matter how noble and patriotic his purpose*". [emphasis added] (Appendix B, *infra*, p. A27) Nevertheless this submissive approach should not signal the attainment of goals so intimately entwined with First Amendment freedoms. Power, politics, and influence represent the antithesis of that which made the underpinnings of the Freedom of Information Act a reality.

The reasonableness or unreasonableness of the Petitioner's requests and as a corollary the reasonableness or unreasonableness of the Respondent's denials remain undecided questions of fact, requiring a rigid assessment of the circumstances and a full unbiased evidentiary hearing. To preclude evidentiary presentation at this level is tantamount to discouraging fundamental research in the sciences, in economics, and in public administration; it most certainly suppresses the right to know, the right to inform, and the right to publish. As a verity, denial of the right to justify and to demonstrate one's purposes is but one more conspicuous example of *prior restraint*.

Furthermore, the Petitioner has not been permitted to factually demonstrate, except through the vehicle of conclusions in written form, that the end results he seeks are relevant to the public good. He has not been afforded the opportunity of presenting to any judicial body, the premise that in balancing the validity of his theories and purposes with any possible harm to an established and orderly process of record keeping—that his efforts will undoubtedly be determined the weightier.

Summary disposition, divorced from an orderly presentation of evidence in court, fails to cast light upon the

intricate, compelling, and specific contours of the Petitioner's claims. The Petitioner, a recognized scholar, in no way intends to sensationalize the product of his research; nor does he indicate any intention of detracting from the dignity of the Kennedy family the rights of privacy to which that family must be entitled, or from the system of record keeping of the Archivist of the United States.

Commenting upon *Machinery Center* v. *Anchor National Life Insurance Company*, 434 F.2d 1, the District Court has indicated with utmost clarity that

> ". . . the relief contemplated by Rule 56 is drastic, and should be applied with caution to the end that the litigants will have a trial on the bona fide factual disputes. Under the rule no margin exists for the disposition of factual issues, and it does not serve as a substitute trial of the case nor require the parties to dispose of litigation through the use of affidavits." (Appendix B, *infra*, pp. A15-A16)

The purpose of Rule 56 is to eliminate some issues and to avoid lengthy and pointless trial litigation, *United States* v. *Gossett*, 416 F.2d 565, *cert. denied*, 397 U.S. 961. Among other functions of summary judgment in addition to avoiding long, expensive, and non-productive litigation are those of curbing dangers that the threat of litigation will be used to harass or coerce settlement, *Washington Post Co.* v. *Keogh*, 365 F.2d 965, *cert. denied*, 385 U.S. 1011. Thus Rule 56, as justly interpreted, does not foreclose a sincere balanced effort to present factual issues; it does not envisage any attempt to enforce ascertainment of the truth through a battle of affidavits and naked conclusions of law.

VII

THE COURT OF APPEALS FOR THE TENTH CIRCUIT ERRED IN AFFIRMING THE RULING OF THE DISTRICT COURT FOR THE DISTRICT OF KANSAS WHICH COURT REFUSED TO ENTERTAIN PETITIONER'S MOTION TO REOPEN SAID CASE FOR THE PURPOSE OF CHALLENGING AFFIDAVITS FILED BY VICE ADMIRAL GEORGE M. DAVIS, CHIEF OF THE UNITED STATES NAVY BUREAU OF MEDICINE AND SURGERY.

On July 27, 1970 and on October 29, 1970, Vice Admiral George M. Davis, Chief of the Bureau of Medicine and Surgery of the United States Navy, submitted affidavits which, in essence, conceded that an autopsy had been performed upon the remains of the late President Kennedy on or about November 22, 1963. Admiral Davis further admitted that, at the time of submitting the affidavits, he had command jurisdiction over the United States Naval Hospital located in Bethesda, Maryland, where the autopsy had been performed seven years earlier.

Admiral Davis asserted in both affidavits that the autopsy protocol with all allied papers ". . . were *thereupon* [November 22, 1963] delivered over to agents [unidentified] of the United States Secret Service. . ." and that he also caused a search to be made of the records of the Medical Department of the United States Navy with the result that no copies of the autopsy protocol or any items relating thereto, as sought by the Petitioner, could be found. [emphasis added] Admiral Davis omitted to mention the date and circumstances surrounding the disappearance of the sought items, if they did so vanish from naval custody.

The petitioner, on October 13, 1970, filed a memorandum brief with the District Court, wherein the Petitioner stated that it is impossible to comprehend the ambiguity surrounding the disposition of the autopsy records of the late President and which include such items as the preserved gross specimens, the preserved wet tissues, and the preserved paraffin blocks with microscopic preparations cut therefrom all encoded A 63-272, or otherwise appropriately. It was further noted by the Petitioner that he had personally mailed to Admiral Davis copies of certain records, later acknowledged by Admiral Davis, and which included:

(a) A copy of the report of the prosectors' secret review in which it was clearly stated that the autopsy protocol was hand delivered by Commander Humes, senior pathologist at the autopsy, to Admiral George G. Burkley, the White House Physician at about 6:30 PM, November 24, 1963.

(b) A copy of the memorandum of Commander Humes, as published by the Warren Commission being exhibit 397 in which it is attested that the holographic protocol and all working papers were delivered to and accepted by Captain J. H. Stover, Commanding Officer, U.S. Naval Medical School, on November 24, 1963.

(c) A copy of the autopsy report (A 63-272) published by the Warren Commission as exhibit 387, in which it clearly states: *"The brain is removed and preserved for further study following formalin fixation."* together with the supplementary autopsy report, dated December 6, 1963 (Warren Commission Exhibit 391) in which it is also clearly stated that exposed films of the late President's brain were hand de-

livered to Admiral Burkley, the President's Physician, and that: *"In the INTEREST OF PRESERVING THE SPECIMEN [brain] coronal sections are not made."* [emphasis added] (Warren Commission Report pp. 541 & 544)

(d) A copy of Admiral Burkley's letter of September 1, 1966, to the Petitioner advising that the sought after items from the autopsy *". . . have been placed in a permanent receptacle that will remain for reference at some future date. These medical files are being held under the same conditions as the President's private papers."* [emphasis added]

The trial court, ignoring Admiral Burkley's Letter (Appendix D, *infra*, p. A37) and the material printed in the Warren Report, *supra*, ruled that the affidavits submitted by Admiral Davis had not been challenged, and that as a result the court could not require production of records not in custody or control of an agency. (Appendix B, *infra*, p. A29) Subsequently, the Petitioner, pursuant to Rule 60, Fed. R. Civ. Proc., filed a Motion to Reopen the Case in order to submit interrogatories to Admiral Davis for further consideration by the District Court. The motion aforesaid was denied on March 22, 1971. On appeal, the determination of the trial court was not disturbed by the Court of Appeals. (Appendix C, *infra*, p. A36)

Throughout, the Petitioner has found it impossible to attach any credence or faith to the affidavits submitted by Admiral Davis, notably in light of obvious conflicts with known facts and manifest evidence of unambiguous circumstances which point up the unreality of each affidavit. Conversely the Petitioner admits that were the affidavits credible the ruling of the trial court would have been

consistent with the intent and purpose of Rule 56, Fed. R. Civ. Proc.

It is obvious to the Petitioner, and any other person, versed in pathology or naval routine, who reads the affidavits aforesaid, that the affidavits were deliberately designed to confuse and mislead both the court and the Petitioner. Most certainly, the competency and credibility of these affidavits are valid issues of fact which should have been assessed by the District Court prior to summary denial of Petitioner's Motion to Reopen the Case. The Petitioner submits that the provisions of Rule 56 at no time envisioned a type of "shotgun application" when it is evident that valid issues of fact, as outlined and presented, should have been assessed at the judicial level.

VIII

OTHER REASONS FOR GRANTING THE WRIT

The conclusions of Senate Report number 813 introduced into the 89th Congress [1965] by the Honorable Edwin V. Long, Senator from Missouri, entitled "Clarifying and Protecting the Right of the Public to Information, and for Other Purposes" clearly state:

1. "The Committee feels that this bill, as amended, would establish a much-needed policy of disclosure, while balancing the necessary interests of confidentiality.

2. "A government by secrecy benefits no one.

3. "It injures the people it seeks to serve, it injures its own integrity and operation.

4. "It breeds mistrust, dampens the fervor of its citizens, and mocks their loyalty.

5. "For these reasons, the committee reports the bill with the recommendation that it be adopted, as amended."

In the House Report, number 813, introduced into the 89th Congress [1965] by the Honorable Byron Rodgers, Representative from Colorado, and entitled "Preserving Evidence Pertaining to the Assassination of President Kennedy" it is stated that the purpose is *"To eliminate questions and doubts. . ."*, and further that *"A failure to do so could lead to loss, destruction, or alteration of vital evidence and in time might serve to encourage irresponsible rumors undermining confidence in the work of the President's* [Warren] *Commission."* [emphasis added]

Both the District Court and the Appellate Court, in interpreting the ensuing legislation, have resorted to devious subterfuges to avoid the clear intent of Congress and the electorate, thereby thwarting the purpose of the Act and frustrating the efforts of a serious scholar. From this one cannot help but conclude that the *public has lost confidence.*

In contrast to the opinion of the District and Appellate Courts in this instance, it is important to recognize an order issued by the Honorable Charles Halleck, Judge of the District of Columbia Court of General Sessions, the text of which is included as Appendix E, *infra,* p. A38. In that case entitled *United States, ex rel., State of Louisiana* v. *Rhoads* (825-69A) Judge Halleck ordered the Archivist of the United States, or his designated agent, to appear at the trial of *Louisiana* v. *Shaw* (198-059C) in New Orleans and take with him certain of the items sought by the Petitioner, namely, the X-ray films and the photographs taken at the autopsy of the late President together with the Mannlicher-Carcano rifle and the bullet CE399. It is

also interesting to observe that the order, above stated, indicated, as the Petitioner requests in this case, that all items were to remain in the possession and control of the Archivist or his designated Agent.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests that a writ of certiorari be granted in this case.

Respectfully submitted,

SAM A. CROW
JOHN E. WILKINSON
M. C. SLOUGH
(Counsel for the Petitioner)

APPENDIX A

5 U.S.C. § 551

§ 551. Definitions

For the purpose of this subchapter—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—(B) the courts of the United States.

5 U.S.C. § 552 (a), (b), (c)

§ 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general

policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public;

unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency also shall maintain and make available for public inspection and copying a current index providing

identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, on request for identifiable records made in accordance with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed, shall make the records promptly available to any person. On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo and the burden is on the agency to sustain its action. In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member. Except as to causes the court considers of greater importance, proceedings before the district court, as authorized by this paragraph, take precedence on the docket over all other causes and shall be assigned for hearing and trial at the earliest practicable date and expedited in every way.

(b) This section does not apply to matters that are—

(1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

44 U.S.C. § 2107

§ 2107. Material accepted for deposit

When the Administrator of General Services considers it to be in the public interest he may accept for deposit—

(1) the papers and other historical materials of a President or former President of the United States, or other official or former official of the Government, and other papers relating to and contemporary with a President or former President of the United States, subject to restrictions agreeable to the Administrator as to their use; and

(2) documents, including motion-picture films, still pictures, and sound recordings, from private sources that are appropriate for preservation by the Government as evidence of its organization, functions, policies, decisions, procedures, and transactions.

44 U.S.C. § 2108 (c) & (d)

§ 2108. Presidential archival depository.

(c) When the Administrator considers it to be in the public interest, he may exercise, with respect to papers, documents, or other historical materials deposited under this section, or otherwise, in a Presidential archival depository, all the functions and responsibilities otherwise vested in him pertaining to Federal records or other documentary materials in his custody or under his control. The Administrator, in negotiating for the deposit of Presidential historical materials, shall take steps to secure to the Govern-

ment, as far as possible, the right to have continuous and permanent possession of the materials. Papers, documents, or other historical materials accepted and deposited under section 3106 of this title and this section are subject to restrictions as to their availability and use stated in writing by the donors or depositors, including the restriction that they shall be kept in a Presidential archival depository. The restrictions shall be respected for the period stated, or until revoked or terminated by the donors or depositors or by persons legally qualified to act on their behalf. Subject to the restrictions, the Administrator may dispose by sale, exchange, or otherwise, of papers, documents, or other materials which the Archivist determines to have no permanent value or historical interest or to be surplus to the needs of a Presidential archival depository.

(d) When the Administrator considers it to be in the public interest, he may cooperate with and assist a university, institution of higher learning, institute, foundation, or other organization or qualified individual to further or to conduct study or research in historical materials deposited in a Presidential archival depository.

44 U.S.C. § 3301

§ 3301. Definition of records

As used in this chapter, "records" includes all books, papers, maps, photographs, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them. Library and

museum material made or acquired and preserved solely for reference or exhibition purposes, extra copies of documents preserved only for convenience of reference, and stocks of publications and of processed documents are not included.

Public Law 89-318

AN ACT

Providing for the acquisition and preservation by the United States of certain items of evidence pertaining to the assassination of President John F. Kennedy.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it is hereby declared that the national interest requires that the United States acquire all right, title, and interest, in and to, certain items of evidence, to be designated by the Attorney General pursuant to section 2 of this Act, which were considered by the President's Commission on the Assassination of President Kennedy (hereinafter referred to as "items"), and requires that those items be preserved by the United States.

SEC. 2. (a) The Attorney General is authorized to determine, from time to time, which items should, in conformity with the declaration contained in the first section of this Act, be acquired and preserved by the United States. Each such determination shall be published in the Federal Register.

(b) Whenever the Attorney General determines that an item should be acquired and preserved by the United States, all right, title, and interest in and to, that item shall be vested in the United States upon the publication of that determination in the Federal Register.

(c) The authority conferred upon the Attorney General by subsection (a) of this section to make determinations shall expire one year from the date of enactment of this Act, and the vesting provisions of subsection (b) of this section shall be valid only with respect to items described in determinations published in the Federal Register within that one-year period.

SEC. 3. The United States Court of Claims or the United States district court for the judicial district wherein the claimant resides shall have jurisdiction, without regard to the amount in controversy, to hear, determine, and render judgment upon any claim for just compensation for any item or interest therein acquired by the United States pursuant to section 2 of this Act; and where such claim is filed in the district court the claimant may request a trial by jury: *Provided,* That the claim is filed within one year from the date of publication in the Federal Register of the determination by the Attorney General with respect to such items.

SEC. 4. All items acquired by the United States pursuant to section 2 of this Act shall be placed under the jurisdiction of the Administrator of General Services for preservation under such rules and regulations as he may prescribe.

SEC. 5. All items acquired by the United States pursuant to section 2 of this Act shall be deemed to be personal property and records of the United States for the purposes of laws relating to the custody, administration, and protection of personal property and records of the United States, including, but not limited to, sections 2071 and 2112 of title 18 of the United States Code.

Sec. 6. There is hereby authorized to be appropriated such sums as may be necessary to carry out the purposes of this Act.

32 C.F.R. § 701.1 (k)

Department of the Navy

Policies and procedures for making records available to the public.

(k) *Appeals to the Secretary of the Navy.*—(1) *Filing an appeal.* Appeals from denials of requests will be made to the Secretary of the Navy. A requester will not have exhausted his administrative remedies, for the purpose of the U.S. District Court review within the purview of 5 U.S.C. 552, until he has made such an appeal. It should be submitted to the officer who made the denial, and should specify the reasons upon which the appeal is based.

(2) *Processing an appeal.* When a written appeal to the Secretary of the Navy is filed, via the official who made the denial, this official will forward the appeal, with full information on the matter and his recommendations, to the Administrative Officer, Navy Department, acting for the Secretary. Information copies will be forwarded to cognizant higher authority within the Department of the Navy. The Judge Advocate General or the General Counsel will process the appeal and make final determinations, within their respective areas of responsibility for legal services (see SECNAVINSTs 5430.25C and 5430.27), and will transmit the Department's determination, in writing, to the appellant. A copy of the final determination will be forwarded to the General Counsel of the Department of Defense in those instances in which the appellant seeks reconsideration by the Secretary of the Navy or initiates legal action to compel release of a record.

41 C.F.R. § 105-60.104 (a)

Title 41—Public Contracts, Property Management
Subpart 105-60.1—General Provisions

§ 105-60.104 Definitions.

For purposes of this Part 105-60, the following terms have the meanings ascribed to them in this § 105-60-104.

(a) *Records.* The term "records" means all books, papers, maps, photographs, or other documentary materials, regardless of physical form or characteristics, made or received by GSA in pursuance of Federal law or in connection with the transaction of public business and preserved or appropriate for preservation as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of GSA or because of the informational value of data contained therein. The term does not include:

(1) Library and museum material made or acquired and preserved solely for reference or exhibition purposes, extra copies of documents preserved only for convenience of reference, and stocks of publications and of processed documents; or

(2) Objects or articles, such as structures, furniture, paintings, sculpture, models, vehicles, or equipment.

(3) Donated historical materials (as defined in § 105-61.001-4) accepted by GSA from a source other than an agency of the U.S. Government in accordance with the provisions of 44 U.S.C. 397.

(b) *Availability.* The term "availability" signifies the right of the public to obtain information, purchase materials, and inspect and copy records and other pertinent information.

(c) *Identifiable.* The term "identifiable" means a description of a record which is specific to the extent that

it will permit the location of the particular document with a reasonable effort.

(d) *Private party.* The term "private party" means any party other than an agency (as defined in 5 U.S.C. 551(c)).

41 C.F.R. § 105-60.404 (a)

§ 105-60.404 Appeal within agency of denial.

(a) After notification that his request for identifiable records has been denied, the person submitting the request may appeal the denial. The appeal shall be submitted to the Director of Information, Washington, D.C., with respect to a Central Office matter or to the Regional Director of Business Affairs with respect to a regional matter. The Regional Director of Business Affairs will promptly forward the appeal to the Director of Information who will, as also in the case of appeals concerning Central Office records, submit the matter for consideration by the Head of the GSA Service or Staff Office concerned with the particular records, in consultation with appropriate Central Office legal counsel. The appeal file will consist of a copy or description (if oral) of the initial request and a copy of the reasons for denial furnished the person submitting the request.

Fed. R. Civ. Proc. 56 (b), (e), (f)
Rule 56.

SUMMARY JUDGMENT

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Fed. R. Civ. Proc. 60 (b)
Rule 60.

RELIEF FROM JUDGMENT OR ORDER

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59 (b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

APPENDIX B

325 F. Supp. 130

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

JOHN NICHOLS,
Plaintiff,
vs.
UNITED STATES OF AMERICA, et al.,
Defendants.

Civil Action
No. 4761

RULING ON MOTION OF DEFENDANTS FOR SUMMARY JUDGMENT

(Filed February 24, 1971)

Plaintiff is a physician duly licensed in Kansas to practice as such and, for the purpose of considering the motion filed by defendants to dismiss or in the alternative for summary judgment, is presumably a qualified pathologist with experience in examining gunshot wounds including their interpretation by X-ray. Plaintiff has instituted this action against the United States of America, the Archivist of the United States, the General Services Administration and the Secretary of the Navy.

The action is brought under provisions of the Federal Public Records Law, being 5 U.S.C. Sections 551-552 (80 Stat. 250, 1966), and venue is claimed under provisions of 28 U.S.C. Section 1391(e)(4). Defendants included are General Services Administration, National Archives and Record Service, and the Department of the Navy.

Plaintiff alleges a general interest in scientific matters and particularly in the areas of pathology and related research. He alleges that he wishes to study certain items

of evidence, in custody or in possession of the defendants, which will afford him an opportunity to resolve conflicting opinions, conclusions and uncertainties concerning the death of the late President John F. Kennedy. He alleges, in substance, that following proper request to them, defendants have either refused him permission to examine the materials described in his complaint or have ignored his requests for such permission.

Briefly stated, plaintiff desires to inspect, study, examine and, as to some materials, submit described material to "neutron activation analysis." He also wishes to see and examine X-rays and photographs made at the autopsy of President Kennedy, various Warren Commission exhibits and the President's clothing worn at the time of the assassination.

Defendants have filed a motion to dismiss or in the alternative for summary judgment. Since affidavits and evidence outside the pleadings have been submitted in support of the motion, under the direction of Federal Rules of Civil Procedure 12(c), the issues raised should properly be considered under Federal Rules of Civil Procedure 56. The Court has been provided with extensive briefs by all parties and assumes that all parties have presented all material they deem pertinent under that rule.

> "The rule followed by this Circuit in regard to motions for summary judgment is clear and while it is the duty of the trial court to grant a motion for summary judgment in an appropriate case, the relief contemplated by Rule 56 is drastic, and should be applied with caution to the end that the litigants will have a trial on bona fide factual disputes. Under the rule no margin exists for the disposition of the factual issues, and it does not serve as a substitute for a trial of the case nor

require the parties to dispose of litigation through the use of affidavits. The pleadings are to be construed liberally in favor of the party against whom the motion is made, but the court may pierce the pleadings, and determine from the depositions, admissions and affidavits, if any, in the record whether material issues of fact actually exist. If, after such scrutiny, any issue as to a material fact dispositive of right or duty remains the case is not ripe for disposition by summary judgment, and the parties are entitled to a trial."

Machinery Center v. *Anchor National Life Insurance Company*, 434 F.2d 1, 6, 10th Cir.

With this guideline to follow in considering defendants' motion, the several grounds advanced by them will be considered to the extent necessary for ruling on the motion as one for summary judgment.

JURISDICTION OF THE COURT— MATERIAL REQUESTED AS "RECORDS"

Defendants question the Court's jurisdiction over the subject matter because plaintiff's demands do not constitute requests for any "identifiable records."

The items requested by plaintiff could scarcely be more clearly identified by him, but a more substantial issue is raised by defendants under their contention that much of the material requested does not fall within the classification of "records" within the purview of the statute.

That the Federal Public Records Law or Information Act, through which plaintiff seeks to obtain information denied him by agencies of the United States, was intended to require disclosure of government records to any person on proper application is clear, and in considering the issues

raised under a motion for summary judgment should be liberally construed to carry out the express purpose of the act, which is discussed by *Judge Croake in Consumers Union* v. *Veterans Administration*, 301 F.Supp. 796, at 799.

> "Consumer Union's request for VA records came in the wake of the passage of the Freedom of Information Act. The key portion of that Act, now codified, is as follows:
>
> > * * * each agency, on request for identifiable records made in accordance with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed, shall make the records promptly available to any person. * * *
>
> The purpose of the Act, seen in the statutory language and the legislative history, was to reverse the self-protective attitude of the agencies under which they had found that the public interest required, for example, that the names of unsuccessful contract bidders be kept from the public. The Act made disclosure the general rule and permitted only information specifically exempted to be withheld; it required the agency to carry the burden of sustaining its decision to withhold information in a de novo equity proceeding in a district court. Disclosure is thus the guiding star for this court in construing the Act. Because portions of the Act are patently ambiguous, its illumination will be most useful."

And so, in considering this matter under a motion for summary judgment, unless the material sought cannot be described as a "record" required to be produced within the meaning of the Act, or if a record does not fall within the numerous exemption provisions of the Act, then as to such a specific record, the motion must be denied.

Under Federal Rules of Civil Procedure 56(d), the Court is authorized to ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. An order may then be made specifying facts that appear without substantial controversy and directing such further proceedings in the action as are just.

Because the term "records" is not defined in the Act, the Court is initially put to the task of deciding which of the items requested by plaintiff may be so classified within the contemplation of the statute. It is unfortunate that attention was not given to this point when the law was enacted since the positive provisions of the Act are all but smothered by some nine broad and generalized statements providing for many exemptions.

Efforts have been made to classify the material which may be considered as a record under the Act, e.g., the General Services Administration adopted the following definition in 41 C.F.R. 105-60.104(a):

> "(a) Records. The term 'records' means all books, papers, maps, photographs, or other documentary materials, regardless of physical form or characteristics, made or received by GSA in pursuance of Federal law or in connection with the transaction of public business and preserved or appropriate for preservation as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of GSA or because of the informational value of data contained therein."

Again, this definition is followed by several general statements of what the defined term does not include.

Not included is library and museum material made or acquired and preserved solely for reference or exhibition purposes; objects or articles, such as structures, furniture, paintings, sculpture, models, vehicles or equipment (not defined), and donated historical materials (as defined in 105-61.001-4), accepted by GSA from a source other than an agency of the United States Government in accordance with provisions of 44 U.S.C. 397 (now 44 U.S.C. 2107 and 2108).

Then, paragraph (b) of the section states:

"(b) Availability. The term 'availability' signifies the right of the public to obtain information, purchase materials, and inspect and copy records and other pertinent information."

If these regulations were designed to be a clarification of what was intended by the term "record," a failure of purpose must be registered. Nor do the declarations of the General Services Administration subtract from the confusion. The Attorney General's memorandum on the Public Information Section of the Administrative Procedure Act offers little help but simply quotes 44 U.S.C. 366, now 44 U.S.C. 3301, stating what material is included by the term "records," and specifically excluding "library and museum material made or acquired and preserved solely for reference or exhibition purposes * * *." Just what constitutes "library and museum material" is not designed or defined.

44 U.S.C. 3301 offers some illumination when it declares that the word "records" includes all books, papers, maps, photographs, *or other documentary materials,* regardless of form or characteristics. (Emphasis added.) But again comes the question, what are "documentary materials"? In *Jones on Evidence,* 5th Ed., Vol. 3, p. 1043, §535, is found this helpful statement:

"For all practical purposes the term 'document' may be considered as synonymous with 'writing.' A document has been defined as 'any substance having any matter expressed or described upon it by marks capable of being read.' A writing or document, in addition to handwritten or printed or typewritten instruments, which first come to mind, should include inscribed chattels, photographic or other mechanical reproductions and sound recordings—even though in the case of sound recordings the inscribed marks may not be visible to the eye and may be read only with the use of mechanical devices."

This Court must assume that since no better definition of the term, "record," is provided by legislative enactment, executive order or controlling judicial determination, reliance may be placed on a dictionary of respected ancestry for a reasonably accurate meaning of the word. In Webster's New International Dictionary, this definition appears:

"That which is written or transcribed to perpetuate knowledge of acts or events; also, that on which such record is made, as a monument; a memorial."

Again, in Webster's New Collegiate Dictionary, the word record is defined as,

"That which is written to perpetuate a knowledge of events * * * that on which such a record is made, a monument."

Though the word "records" was used in the United States Constitution, Article IV, Section 1, in which full faith and credit is required to be given in each state to the public records of every other state, I am unable to find a judicial interpretation of what is intended by the use of

the word "records," nor is one shown to me. An examination of Words and Phrases likewise has offered little aid in defining the term.

A record is intended to serve as evidence of something written, said or done and is not kept to gratify the curious or suspicious. *Owens* v. *Woolridge*, 22 Pa. Co. Ct. Rep., 237, 240.

Thus, under any reasonable calculation of what is intended to be covered by the congressional enactment referred to as the Information Act, it seems clear that the provisions of 5 U.S.C. 552, under which plaintiff seeks relief, limits the authority of a district court to enjoin an agency from withholding *records* and to order production of any agency *records* improperly held from complainant.

Without being concerned with the numerous exemptions provided in the Act under which defendants seek to avoid compliance with the general terms of the Act, we might consider the items for which request was made and to which the statute in its present form could not apply.

If the statute is to receive a broader application, Congress must enlarge its provisions to apply to items this Court does not believe were intended to be included in its provisions. The following items requested by plaintiff for examination, inspection and study, described in paragraph 5 of plaintiff's complaint may not be classified as a "record" within the meaning of the Act, to wit:

(a) The 6.5 mm Mannlicher-Carcano rifle, C2766, formerly the property of the late Lee Harvey Oswald. This was designated as Exhibit CE139 in the Warren Report.

(b) A live 6.5 mm round manufactured by Western Cartridge Company and found in the chamber

of Oswald's Rifle, C2766. Warren Report Exhibit CE141.

(c) The coat worn by President Kennedy at the moment of his assassination believed to contain trace metals from bullet CE399. The coat is Warren Report Exhibit CE393.

(d) The shirt worn by President Kennedy at the moment of his assassination believed to contain trace metals from the bullet that penetrated the fabric. Warren Report Exhibit CE344.

(e) There is no subparagraph (e).

(f) The 6.5 mm bullet found on the floor of Parkland Memorial Hospital in Dallas, Texas on November 22, 1963, where the late President and Governor Connally received medical treatment, believed to be the bullet that traversed the President's neck and on through the body of Connally. Warren Report Exhibit CE399.

(g) Three empty 6.5 mm Cartridge cases manufactured by Western Cartridge Company and found on the floor of the room on the 6th floor of the Texas School Book Depository in Dallas, Texas. Warren Report Exhibit CE543, CE544 and CE545.

(h) Bullet recovered from the wall of the home of General Edwin A. Walker in Dallas, Texas. Warren Report Exhibit 573.

(i) The clip presumably from the magazine of the Oswald rifle, C2766. Warren Report Exhibit CE575.

(j) The two or three metal fragments removed from the wrist of Governor Connally. Warren Report Exhibit CE842.

(k) Fragments of metal removed from the brain of the late President at autopsy. Warren Report Exhibit CE843.

(l) A mutilated bullet recovered by United States personnel after firing through a cadaver's wrist for the purpose of weighing it. Warren Report Exhibit CE856.

Defendants also rely on provisions of 44 U.S.C. 2107 and 2108(c) to justify their refusal to produce for examination and inspection items identified and described by plaintiff in paragraph 6 of plaintiff's complaint because they are now in possession of the defendant Archivist Division of General Services Administration by virtue of their transfer to the agency by an authorized representative of the Estate of John F. Kennedy. The described property was received by the agency as a gift subject to the conditions and restrictions specified by the donor. Though plaintiff contends that the Letter of Agreement, dated October 29, 1966, executed on behalf of the executors of the Kennedy Estate, assumes that the donor had full title to the materials described therein, and is, in fact, a nullity because under a Memorandum of Transfer, dated April 26, 1965, the Archivist had in his custody the items which plaintiff seeks to examine and that the rules and guidelines of the Letter of Agreement cannot be held to exclude the right of a citizen to examine property which plaintiff says was property of the United States in the first place, the Court does not believe this to be a correct conclusion.

The applicable statute does not require that the items of property deposited with the Archivist be owned by the

donor if they fall within the description of those things which may be deposited. Under the provisions of the Letter Agreement, no examination of this material may be permitted without permission of the Kennedy family representative within five years of October 29, 1966. It is not claimed by plaintiff that such permission has been obtained.

Furthermore, a review of PL 89-318, 79 Stat. 1185, enacted in 1965, discloses that Congress provided for the acquisition and preservation of certain items of evidence pertaining to the assassination of President Kennedy. Pursuant to that law, the Attorney General was given authority for one year to acquire various items. The act provided for the vesting of title and interest in the United States and provided for just compensation under circumstances requiring this. Some of the items identified in plaintiff's request were included in the acquisition of material obtained and delivered to GSA by the Attorney General. The proceedings taken for that purpose are valid. Cf. *United States* v. *One 6.5 mm. Mannlicher-Carcano Military Rifle, etc.*, 406 F.2d 1170. Also, under the provisions of PL 373, 69 Stat. 695, now 44 U.S.C. 2108, the administrator of General Services was authorized to accept for deposit the papers and other historical materials of any president, and documents, including motion-picture film, still pictures, etc., from private sources. The act also provided:

> "That papers, documents, or other historical materials accepted and deposited under subsection (e) and this subsection shall be held subject to such restrictions respecting their availability and use as may be specified in writing by the donors or depositors, including the restriction that they shall be kept in a Presidential archival depository, and such restrictions shall be re-

spected for so long a period as shall have been specified, or until they are revoked or terminated by the donors or depositors or by persons legally qualified to act on their behalf with respect thereto."

The Court can attach no significance to the fact that the material was deposited with GSA in April, 1965, while the Letter Agreement placing restrictions on their use was not entered into until October 29, 1966.

The administrator of GSA had a continuing responsibility under the terms of the Act to negotiate and take such steps for the deposit and preservation of Presidential historical materials so as to secure for the government, as far as possible, the right to have continuous and permanent possession of such material. This was a continuing responsibility of the administrator. He was authorized to accept papers, documents or other historical materials (records are not mentioned but presumably intended to be included) subject to such restrictions as to availability and use as may be specified in writing by the donors or depositors.

The Letter Agreement of 1966 was entered into by the parties under the provisions of then existing law. Under this Letter Agreement, the items requested by plaintiff in paragraph 6 of his complaint may be withheld from disclosure or examination since the time limit of five years therein provided has not expired. Other reasons may exist for such refusal but need not now be considered.

Plaintiff, in addition to the items requested above, sought, as alleged in paragraph 8 of his complaint, three additional items specifically described as:

(a) A grey-brown rectangular structure measuring approximately 13 x 20 mm seen in photographs of the base of the brain of the late President Kennedy.

(b) Histological preparations of the margins of the bullet holes in the skin of the neck of the late President Kennedy which were part of the Bethesda autopsy.

(c) The written diagnosis or findings made by the Bethesda Hospital radiologist from his X-ray study of X-ray films taken at the autopsy of the late President.

The Court believes that requests for items described in (a) and (b) above cannot be classified as records within the meaning of 5 U.S.C. 552, but that the diagnosis and findings of the radiologist is a record.

In this connection, request was made on the Secretary of the Navy for the diagnosis and findings. By positive affidavit, Mr. George M. Davis, Vice Admiral, Chief of Bureau of Medicine and Surgery of the Medical Corps, U. S. Navy, having command jurisdiction over the Bethesda Naval Hospital, denies any custody or control by that agency of the radiologist's report or of any of the other items requested of the Navy for examination. (Doc. 13.) It appears from this affidavit that the material requested was delivered to agents of the United States Secret Service on or about November 22, 1963. The accuracy of this affidavit is not challenged and the Court may not require production of records not in custody or control of an agency.

Defendant archivist offers to show the 8 mm motion picture of the assassination at the building housing the archives of the United States at Washington, and to supply a large scale map of Dealy Plaza in Dallas, Texas.

While a view of the motion picture in the federal courtroom here in Topeka would be a matter of substantial interest to this Court, under the circumstances, no useful purpose would be served by such exhibition. The assassination of President Kennedy continues to give rise to much

speculation and scientific analysis by students, pathologists, historians and law enforcement agencies. Undoubtedly much more will be discussed and written about the case, the circumstances of which has aroused worldwide curiosity.

Though the Information Act, under which plaintiff seeks relief and it is only because of its terms that this Court has any jurisdiction, does by its terms require the production of all records by the agency having custody of them, the government agencies seem prone to deny disclosure and to withhold records under the many exemptions, including those enumerated in the statute, and under other statutory laws, the common law, by reason of executive privilege, by executive orders, or by agency-made law in the form of regulations and orders.

Until Congress sees fit to wipe out these exemptions, so far as it is constitutionally able to do so, a person in plaintiff's position, though he be possessed with superb qualifications, has the purest intentions and be so ever objective in his research and entitled to pursue it, will be thwarted by the influence and pressures exerted by bureaucrats which will likely hamper his investigations, no matter how noble and patriotic his purpose.

The Information Act leaves a good many things not clearly defined. Because of this, the Attorney General issued a memorandum analyzing the act. He indicates that actions for injunctions permitted by the act should be maintained against the agency refusing to make requested agency records available to the person requesting them rather than the head of the agency or one or more of its officers. Government agencies, when notified that they are to come before the Court, should not be too technical about the manner in which they are described or served.

I hold in this case that the agencies named in the pleadings are properly before the Court.

The Court must determine, from what has been said, that the exemptions provided in the Information Act leave unavailable most material sought by a citizen in situations where an agency may resort to one or more of the many excuses afforded under the exemptions provisions, as here.

After thorough consideration of the record in this case and a study of the applicable statutes and regulations, I must conclude that no material issue of fact exists, that under the law the case is ripe for disposition by summary judgment, and that the motion of defendants to dismiss, treated as a motion for summary judgment, must be sustained.

IT IS SO ORDERED.

Dated at Topeka, Kansas, this 24th day of February, 1971.

/s/ George Templar
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

March Term, 1972

JOHN NICHOLS,

Plaintiff-Appellant,

v.

THE UNITED STATES OF AMERICA; ARCHIVIST OF THE UNITED STATES, JAMES B. RHOADS; THE GENERAL SERVICES ADMINISTRATION, and SECRETARY OF THE NAVY, JOHN H. CHAFEE,

Defendants-Appellees.

No. 71-1238
(T-4761)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

(Filed May 12, 1972)

M. C. Slough, St. Marys, Kansas, (Sam A. Crow and John E. Wilkinson, Topeka, Kansas, with him on the brief) for Appellant.

Barbara L. Herwig, Department of Justice, Washington, D. C., (L. Patrick Gray, III, Assistant Attorney General, Robert J. Roth, United States Attorney, and Walter H. Fleischer, Department of Justice, Washington, D. C., with her on the brief) for Appellees.

Before LEWIS, Chief Judge; HOLLOWAY and BARRETT, Circuit Judges.

LEWIS, Chief Judge.

In this action brought under the Freedom of Information Act, 5 U.S.C. § 552, the appellant sought a court order requiring the appellees to produce certain items relating to the assassination of President John F. Kennedy. The appellant is a physician licensed to practice in the State of Kansas and is a professor of pathology at the University of Kansas Medical Center. He wishes to study and examine photographs and X-rays taken at the autopsy of the late president performed at the Bethesda Naval Hospital. He requests permission to examine under his own microscope the histological preparations of the margins of the bullet holes in the skin of the neck of the late president, and study the diagnosis and findings of the Bethesda Hospital radiologist from his study of the X-ray films taken at the autopsy. He also desires to study and submit to "neutron activation analysis" various specified exhibits of the President's Commission on the Assassination of President Kennedy (Warren Commission) including, among other things, the clothing worn by President Kennedy at the time of the assassination, and various bullets and bullet fragments associated with his death.

Prior to filing this action the appellant had requested permission from the U. S. Navy and the Archivist of the United States to study, examine, and perform tests on the items now listed in the complaint.[1] The U. S. Navy re-

1. As listed in the complaint, the items requested from the Archivist are: (1) the 6.5 mm Mannlicher-Carcano rifle, Serial C2766, formerly the property of the late Lee Harvey Oswald, Warren Commission Exhibit CE 139; (2) a live 6.5 mm round of ammunition found in the chamber of Oswald's rifle, CE 141; (3) the coat worn by the late President Kennedy at the time of the assassination, CE 393; (4) the shirt worn by the late

sponded by the affidavit of Vice Admiral Davis, Chief of the Bureau of Medicine and Surgery, that the items and information requested by the appellant were no longer in the custody of the U. S. Navy. The National Archivist offered to show plaintiff all available materials concerning the Kennedy asssassination subject to its regulations regarding access to Warren Commission Exhibits. It also offered to make photographs for him of three-dimensional exhibits which have been placed in glass cases for preservation, but declined to allow him to handle or submit these exhibits to any laboratory tests.

Having exhausted his administrative remedies, the appellant brought this action. The appellees responded with a motion to dismiss, or in the alternative, for summary judgment. The trial court concluded that there was no material issue of fact in the case and that the case was ripe for disposition. The appellees' motion for summary judgment was granted. The memorandum opinion of the trial court is reported at 325 F. Supp. 130.

President Kennedy at the time of the assassination, CE 394; (5) a 6.5 mm bullet found on the floor at Parkland Memorial Hospital on November 22, 1963, CE 399; (6) three empty 6.5 mm cartridge cases found on the 6th floor of the Texas School Book Depository in Dallas, Texas, CE 543, CE 544 and CE 545; (7) a bullet recovered from the wall of the home of Major General Edwin A. Walker in Dallas, Texas, CE 573; (8) the clip presumably from the Oswald rifle C2766, CE 575; (9) two or three metal fragments from the wrist of Governor Connally, CE 842; (10) metal fragments removed from the brain of the late president at the autopsy, CE 843; (11) a mutilated bullet fired through a cadaver's wrist in an attempt to reproduce Governor Connally's wrist wound, CE 856; and (12) certain X-ray films and gross photographs both black-white and color transparencies, made of the late president at autopsy.

The items requested of the U. S. Navy are (1) a grey-brown rectangular structure measuring approximately 13 x 20 mm observed in photographs of the base of the brain of the late President Kennedy by an expert review panel assembled by the Attorney General in February 1968; (2) the histological preparations of the margins of the bullet holes in the skin of the neck of the president; and (3) the written diagnosis and/or findings made by the Bethesda Hospital radiologist from his study of the X-ray films taken at the autopsy.

The Freedom of Information Act, 5 U.S.C. § 552, enacted in its present form in 1967, provides for free access by the public to records and information in the custody of federal agencies, and provides for nine exceptions to the general rule of free access. Subsection (c) of § 552 makes it clear that *all* records and information in agency possession are accessible to members of the public unless they come within one of the nine exceptions. Most of the items sought to be examined by the appellant were found by the trial court to be not included in the meaning of the word "records" as it is used in 5 U.S.C. § 552. We do not find it necessary to reach that question. All of the items requested from the United States Archivist fall within the third of the nine exceptions to the general rule of disclosure. Subsection (b)(3) states that the statute "does not apply to matters that are specifically exempted from disclosure by statute. . . ."

All of the items sought from the Archivist by appellant came into custody of the United States Archivist pursuant to two statutes. Most of the Warren Commission exhibits which appellant seeks to examine[2] were acquired under authority of Public Law 89-318 which was passed by Congress on November 2, 1967. Public Law 89-318 declares that the national interest requires that the United States acquire certain items of evidence considered by the Warren Commission, and that those items be preserved by the United States. It gives the Attorney General authority to determine which items should be acquired and preserved. It further states that:

> All items acquired by the United States pursuant to Section 2 of this Act shall be placed under the

2. All of the items in custody of the Archivist except the items of personal clothing worn by the president at his death, and the autopsy X-rays and photographs were acquired pursuant to Public Law 89-318. See footnote 1 *supra*.

> jurisdiction of the Administrator of General Services *for preservation* under such rules and regulations as he may prescribe. (Emphasis added.)

The authority given to the Administrator has been delegated to the Archivist. Pursuant to the authority granted by Public Law 89-318 the Archivist has prescribed rules and regulations concerning the viewing, study, and use of the Commission exhibits and which are reasonably designed to secure their preservation. Three-dimensional articles (most of the items sought by appellant) may be viewed by researchers, but may not be handled or tested; they may not be removed from the Archives building except with approval of the Archivist and only by a federal employee; their custody may not be given to any other person for any purpose. These rules and regulations are clearly within the scope of the congressional grant of authority of Public Law 89-318 and are reasonably designed to accomplish the purpose intended. We conclude that the items acquired by the United States pursuant to the provisions of Public Law 89-318 fall within the exception of 5 U.S.C. § 552(b)(3).

The remainder of these items requested from the Archivist by appellant came into custody of the U. S. Archives pursuant to 44 U.S.C. §§ 2107, 2108(c), which authorize the Administrator of General Services to accept for deposit papers, documents, and other historical materials of a president of the United States subject to the restrictions imposed by the donors or depositors as to their availability and use. The items of personal clothing worn by the president at the time of the assassination and the photographs and X-ray films taken at the autopsy were placed on deposit with the Administrator of General Services by the executors of the Kennedy estate subject to the terms of a letter of agreement of October 29, 1966, which agreement remains in effect during the lives of the late president's

widow, children, parents, brothers and sisters. The agreement places certain definite restrictions on access to the materials[3] and authorizes the Administrator of General Services to impose such other restrictions on their accessibility as he deems necessary and appropriate.

The appellant challenges the authority of the Kennedy estate to donate the materials and place restrictions on them. He claims that the items deposited were property of the United States, were not part of the Kennedy estate, and thus could not be donated by the estate. The trial court concluded that it was not necessary that the depositor

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3. Paragraph I(2)(b) of the letter of agreement permits restricted access to Appendix A materials which include the items of personal clothing. Access is permitted to

> Any serious scholar or investigator of matters relating to the death of the late President, for purposes relevant to his study thereof. The Administrator shall have full authority to deny requests for access, or to impose conditions he deems appropriate on access, in order to prevent undignified or sensational reproduction of the Appendix A materials. The Administrator may seek the advice of the Attorney General or any person designated by the Attorney General with respect to the Administrator's responsibilities under this paragraph . . . .

Paragraph II(2)(b) deals with Appendix B materials which consist of the autopsy X-rays and photographs. Access to these items is permitted to

> (b) Any recognized expert in the field of pathology or related areas of science or technology, for serious purposes relevant to the investigation of matters relating to the death of the late President; provided, however, that no access to the Appendix B materials pursuant to this paragraph II(2)(b) shall be authorized until five years after the date of this agreement except with the consent of the Kennedy family representative . . . . For the purposes of this paragraph, the determination of whether such an expert has suitable qualifications and serious purposes shall be made by the Kennedy family representative. No access shall be authorized pursuant to this paragraph II(2)(b) during the lives of the individuals referred to in the second paragraph of this agreement [members of the Kennedy family] for any purpose involving reproduction or publication of the Appendix B materials without the consent of the Kennedy family representative, who shall have full authority to deny requests for access, or to impose conditions he deems appropriate on access, in order to prevent such use of the Appendix B materials.

of such materials be their "owner." We agree with the trial judge's conclusion. The statute does not require that the depositor of historical materials be the "owner" of those materials. In addition, we reject appellant's argument on the ground that he has no standing to claim that the Kennedy estate had no proprietary interest in the materials. The parties to the letter of agreement were the Administrator of General Services of the United States and the representative of the Kennedy estate. Both parties recognized the proprietary interest of the Kennedy estate in the materials placed on deposit under the agreement. The appellant was not a party to the agreement, and absent a claim of ownership on the part of appellant, he has no standing to object to the letter of agreement or its terms. We conclude that the letter of agreement of October 29, 1966, is a valid binding agreement and that the restrictions on access and inspection imposed thereby are reasonable.

With regard to the items requested from the United States Navy, we again note that Vice Admiral George M. Davis, having command jurisdiction over the Bethesda Naval Hospital, has sworn by affidavit that the items requested by appellant are not in the custody of the Navy. This affidavit was left unchallenged in the lower court. After the trial court granted appellees' motion for summary judgment the appellant filed a motion to reopen the case in which he attempts to challenge Admiral Davis' affidavit. The motion to reopen appears to be made pursuant to Rule 60, Fed. R. Civ. P. Rule 60 motions are addressed to the sound discretion of the trial court and its determination will not be disturbed on appeal in absence of a showing of abuse of discretion. Valmont Industries, Inc. v. Enresco, Inc., 10 Cir., 446 F. 2d 1193; Winfield Associates, Inc. v. Stonecipher, 10 Cir., 429 F. 2d 1087. The appellant's arguments to this court concerning the truth of the statements

contained in Admiral Davis' affidavit are insufficient to establish an abuse of discretion by the trial court in refusing to reopen the case.

The appellant urges that there are several genuine issues of material fact and that the trial court therefore erred in granting summary judgment for appellees. While it is true that the relief contemplated by Rule 56 is drastic and should be applied with caution, it is nevertheless the duty of the trial court to grant a motion for summary judgment in an appropriate case. Machinery Center, Inc. v. Anchor National Life Ins. Co., 10 Cir., 434 F. 2d 1; Smoot v. Chicago, Rock I., & P.R.R., 10 Cir., 378 F. 2d 879. Where there are no disputed material facts, the case is ripe for disposition by summary judgment. Bumgarner v. Joe Brown Co., 10 Cir., 376 F. 2d 749. The appellant's assertion of factual issues in his brief lack any support whatsoever in the record. We can only conclude that there were no material issues of fact before the trial court. The motion for summary judgment was properly granted.

AFFIRMED.

APPENDIX D

Admiral Burkley's response of September 1, 1966 to the Petitioner's request of August 21, 1966, to Major General Joe M. Blumberg [director of the Armed Forces Institute of Pathology] for permission to view the X-ray films and photographs taken at the autopsy of the late President John F. Kennedy as well as to study the preserved gross organs and microscopic preparations acquired at autopsy.

THE WHITE HOUSE
WASHINGTON

September 1, 1966

Dear Dr. Nichols:

Your letter of August 21 addressed to Dr. Joe M. Blumberg has been referred to me for reply.

All the pertinent facts concerning the late President Kennedy were supplied to the Warren Commission for their information and evaluation.

All other medical records have been placed in a permanent receptacle that will remain for reference at some future date. These medical files are being held under the same conditions as the President's private papers.

Sincerely,

George G. Burkley
Vice Admiral, MC, USN
Physician to the President

John Nichols, M.D., Ph.D.
Associate Professor of Pathology
University of Kansas Medical Center
Rainbow Boulevard at 39th Street
Kansas City, Kansas 66103

cc: Dr. Blumberg

APPENDIX E

THE UNITED STATES OF AMERICA, ss:

The President of the United States of America

To the Honorable the Judges of the District of Columbia Court of General Sessions.

(Seal)

GREETING:

WHEREAS, *lately in the District of Columbia Court of General Sessions, before you or some of you, in a cause between* the STATE OF LOUISIANA, Plaintiff, and CLAY L. SHAW, Defendant, Criminal No. 825-69A, wherein the judgment of the court is as follows:

ORDER

(Filed March 13, 1969)

February 17, 1969

Judge Halleck

ORDERED that Dr. James B. Rhoads, or his designated agent, appear in the State of Louisiana, Parish of Orleans, and there give testimony in Section "C" of the Criminal District Court of the Parish of Orleans in the trial of *State of Louisiana* v. *Clay L. Shaw*, and that he take with him the photographs and x-rays taken at the autopsy of the late President John F. Kennedy, and now in the custody of the Archivist, and the items (a), (b), (j), (l), and (m), as described in the certificate of Judge Edward C. Haggerty, Jr., executed on January 21, 1969, and it is

FURTHER ORDERED that the aforementioned items are to remain in the possession and control of the Archivist, or his designated agent, at all times, and are not to be

tampered with, mutilated, test-fired, or in any way whatsoever changed in form or content, and at the conclusion of said trial in the Criminal District Court are to be returned to the Archives in their present condition.

This order is entered upon the representation in open court by a representative of the office of the District Attorney, Parish of Orleans, that these conditions will be honored and upon receipt by the Court in said Parish on this day that the above conditions of this order will be honored, and it is

FURTHER ORDERED that this order is stayed until such time as the District Attorney of Orleans Parish gives the Archivist written notification of at least 48 hours in advance of his desired appearance in New Orleans to testify in the above-captioned matter.

MANDATE

YOU, THEREFORE, ARE HEREBY COMMANDED *that such execution and further proceedings be had in said cause in conformity with the judgment of this court as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.*

WITNESS *the Honorable* ANDREW M. HOOD, *Chief Judge of the District of Columbia Court of Appeals, the 13th day of March, in the year of our Lord one thousand nine hundred and sixty-nine.*

/s/ C. Newell Atkinson
Clerk of the District of Columbia Court of Appeals.

DISTRICT OF COLUMBIA
COURT OF APPEALS

January Term, 1969

Criminal No. 825-69A

No. 4901

IN RE: DR. JAMES B. RHOADS
Archivist of United States

BEFORE: Hood, Chief Judge, Kelly, and Gallagher, Associate Judges.

Order

(Filed February 27, 1969)

Upon consideration of the motion of the United States Attorney to vacate judgment below and remand with direction to dismiss, and the court being informed that the State of Louisiana does not object thereto, and it appearing that the issues raised by this appeal have become moot, it is

ORDERED that the order of the trial court dated February 17, 1969 be vacated and the case remanded to the trial court with instructions to dismiss as moot.

By the Court:
Andrew M. Hood,
Chief Judge.

February 27, 1969

Explanation of Appendix E

This is the February 17, 1969, order of the Honorable Judge Halleck of the District of Columbia Court of General Sessions requiring the Archivist of the United States, upon 48 hour notice of the State of Louisiana, to take to New Orleans, for evidence in *Louisiana* v. *Shaw* [198-059-C], the photographs and X-ray films taken at autopsy of the late President Kennedy, sought by the Petitioner; together with (a) the Mannlicher-Carcano rifle, also sought by the Petitioner; (b) the bullet CE 399, also sought by the Petitioner; (j) X-ray films of Governor Connally's injuries taken at Parkland Hospital, *not* sought by the Petitioner; (l) fragments of bullet CE 567, *not* sought by the Petitioner; and (m) fragments of bullet CE 569, *not* sought by the Petitioner. This unchallenged order was vacated by the District of Columbia Court of Appeals on February 27, 1969 when the issue became moot.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-210

JOHN NICHOLS, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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1. This is an action brought under the Freedom of Information Act, 5 U.S.C. 552, against the United States and its officials to compel them to permit petitioner, a pathologist at the University of Kansas Medical Center, to inspect, study and examine photographs taken of the autopsy of the late President John F. Kennedy; to study and to submit to "neutron activiation analysis" various specified exhibits of the Warren

Commission [1] and a grey-brown rectangular structure measuring approximately 13x20 mm. seen in photographs of the base of the brain of the late President; and to examine histological preparations of the margins of the bullet holes in the skin of the neck of the late President and the written diagnosis and/or findings made by the Bethesda Hospital radiologist from his study of the x-ray films taken during the autopsy (R. 1-18).

Pursuant to regulations promulgated under Public Law 89-318, 79 Stat. 1185, which authorized the acquisition of the Warren Commission exhibits, the Archivist of the United States offered to make available to petitioner for viewing all available material concerning the assassination. The Archivist also offered to make photographs for petitioner of the three dimensional exhibits which had been placed in glass cases for preservation. The Archivist, however, declined to allow petitioner to handle or submit these exhibits to any laboratory tests and, acting pursuant to a letter agreement with the executors of the estate of President Kennedy, the Archivist declined to make available x-ray films and photographs made at the autopsy,[2] and also declined to make available for test-

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[1] The specific items petitioner requested are set out in the opinion of the court of appeals (Pet. App. C, p. 34, n. 3).

[2] The autopsy materials come within paragraph II(2)(b) of the letter agreement which limits access to these items to (Pet. App. C, p. 34, n. 3):

> Any recognized expert in the field of pathology or related areas of science or technology, for serious purposes relevant to the investigation of matters relating to the death

ing and handling the clothing worn by President Kennedy on the day of the assassination.[3]

The Department of the Navy, from which petitioner requested the other autopsy materials (Pet. App. A,

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of the late President; provided, however, that no access to the Appendix B materials pursuant to this paragraph II(2)(b) shall be authorized until five years after the date of this agreement except with the consent of the Kennedy family representative * * *. For the purposes of this paragraph, the determination of whether such an expert has suitable qualifications and serious purposes shall be made by the Kennedy family representative. No access shall be authorized pursuant to this paragraph II(2)(b) during the lives of the individuals referred to in the second paragraph of this agreement [members of the Kennedy family] for any purpose involving reproduction or publication of the Appendix B materials without the consent of the Kennedy family representative, who shall have full authority to deny requests for access, or to impose conditions he deems appropriate on access, in order to prevent such use of the Appendix B materials.

[3] The clothing comes within paragraph I(2)(b) of the letter agreement (Pet. App. C, p. 34, n. 3) which permits access to:

> Any serious scholar or investigator of matters relating to the death of the late President, for purposes relevant to his study thereof. The Administrator shall have full authority to deny requests for access, or to impose conditions he deems appropriate on access, in order to prevent undignified or sensational reproduction of the Appendix A materials. * * *

Pursuant to the agreement the Archivist adopted regulations permitting serious scholars or investigators to view photographs of articles of the late President's clothing, but they are not permitted to inspect them physically or remove them from the National Archives (R. 25).

p. 31, n. 1), did not have custody of them and consequently denied petitioner's request (R. 48-50, 100).

2. The district court held that the materials sought by petitioner, with the exception of the diagnosis and findings of the radiologist, were not records within the meaning of the Freedom of Information Act (5 U.S.C. 552(a)(3)), which provides that "each agency, on request for identifiable records made in accordance with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed, shall make the records promptly available to any person".[4]

The court of appeals did not reach that issue, but held that even if these materials were records, they are within the exception to the Freedom of Information Act (5 U.S.C. 552(b)(3)) making the Act inapplicable where the records requested are "specifically exempted from disclosure by statute." The court noted that the materials requested were acquired either under the authority of Public Law 89-318, 79 Stat. 1185, relating to the acquisition of Warren Commission Exhibits, or under 44 U.S.C. 2107, 2108 (c), which authorizes the Administrator of the Gen-

[4] The request for the diagnosis and findings of the radiologist was made to the Department of the Navy. The Chief of the Bureau of Medicine and Surgery of the Medical Corps, who had command jurisdiction over Bethesda Naval Hospital, denied in an uncontroverted sworn affidavit having custody and control of this document and the other autopsy materials requested from the Navy. The district court granted summary judgment dismissing the complaint as to the Secretary of the Navy (Pet. App. B, p. 26).

eral Services Administration to accept for deposit papers, documents and other historical materials of a president of the United States.

Public Law 89-318, 79 Stat. 1185, authorizing the acquisition of the Warren Commission exhibits, expressly provides that items are to be acquired "for preservation under such rules and regulations as [the Administrator] may prescribe."[5] The court of appeals held that (Pet. App. C, p. 33):

> Pursuant to the authority granted by Public Law 89-318 the Archivist has prescribed rules and regulations concerning the viewing, study, and use of the Commission exhibits and which are reasonably designed to secure their preservation. Three-dimensional articles (most of the items sought by appellant) may be viewed by researchers, but may not be handled or tested; they may not be removed from the Archives building except with approval of the Archivist and only by a federal employee; their custody may not be given to any other person for any purpose. These rules and regulations are clearly within the scope of the congressional grant of authority of Public Law 89-318 and are reasonably designed to accomplish the purpose intended. We conclude that the items acquired by the United States pursuant to the provisions of Public Law 89-318 fall within the exception of 5 U.S.C. § 552(b)(3).

The statute authorizing the acceptance of presidential materials (44 U.S.C. 2107 and 2108(c))

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[5] The authority given the Administrator of General Services Administration has been delegated to the Archivist (Pet. App. C, p. 33).

through which the autopsy photographs and President Kennedy's personal clothing came into the possession of the Archivist, expressly authorizes acceptance of the materials subject to restrictions imposed by the donors. The court of appeals held that the restrictions, which were agreed to by the Administrator of the General Services Administration, similarly exempted the specified items from disclosure under 5 U.S.C. 552(b)(3) (Pet. App. C, p. 33-34).[6]

3. Petitioner's arguments are thoroughly discussed in the opinion of the court of appeals, upon which we rely. We also submit that for the reasons set out in its opinion, the district court properly concluded that the items were not "records" under the Freedom of Information Act (Pet. App. B, p. 26). Finally, in addition to the exemptions discussed in the opinions below, we submit that the Archivist complied with the Freedom of Information Act when he made "available" for viewing the Warren Commission exhibits and provided petitioner with photographs of the three-

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[6] Petitioner's challenge to the right of donors to impress restrictions on donated materials is without merit. See 44 U.S.C. 2107. Cf. also H. Rep. No. 998, 84th Cong., 1st Sess. p. 6: "* * * certain restrictions as to access and use [are] essential if private papers are to come into public custody at all." Petitioner's further assertion (Pet. 15) that the requested materials are not "papers, documents, or other historical materials," as those terms are used in 44 U.S.C. 2107, 2108(c), is baseless. Moreover, even though x-rays and photographs may have been developed at a U.S. Navy hospital, they are still "historical materials." Many Presidential materials are prepared under Government auspices. However, 44 U.S.C. 2107 and 2108 make no distinctions based on the original source of the donated material.

dimensional objects which had been placed in glass cases for preservation. Congress obviously did not intend that originals of irreplaceable records (assuming the items petitioner requested are "records") be made available "to any person" at any time to handle and conduct tests. Moreover, the autopsy report and related materials also come within the exemption to the Freedom of Information Act for "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy" (5 U.S.C. 552(b)(6)). Under petitioner's construction of the Act, "any person" would have unrestricted access to autopsy materials and reports merely because the autopsy was performed in a government hospital. Congress could hardly have intended to authorize a procedure which would subject the family of the deceased to the extreme emotional distress attendant on such disclosure.

The courts below properly dismissed petitioner's complaint under the Freedom of Information Act.[7] It is, therefore, respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

SEPTEMBER 1972.

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[7] Petitioner's allegation that there is a dispute as to his intent, motivation, and overall purposes (Pet. 19) overlooks the fact that these considerations were not relevant to the denial of his request.

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